No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Petition For Writ Of Certiorari To The Oregon Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Where uncontradicted and uncontested evidence before the City in a hearing for commercial development approval demonstrates that the development will have a direct impact on the transportation and storm drainage system, and the City finds that a condition of development approval requiring dedication of land for use in those public systems is required by city law and is reasonably related to those impacts, did the conditional development approval (in lieu of denial for failure to meet city standards) violate the Takings Clause of the Fifth Amendment of the United States Constitution?

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Respondent City of Tigard respectfully requests that this Court deny the Petition For Writ of Certiorari (Petition) of Florence Dolan (Petitioner) seeking review of the decision of the Oregon Supreme Court in this case. That decision is consistent with the decisions of this Court and other lower courts. The Petition does not establish the existence of a conflict among lower court decisions requiring action by this Court. The Petition contains misstatements of material fact and misrepresents the nature and procedural posture of this case. While the issue presented is important, the Petition has not established that consideration of this case is warranted.

I. STATEMENT OF THE CASE

Respondent City of Tigard (Respondent or City) presents the following Statement of the Case to supplement that presented by Petitioner. Petitioner's statement contains misstatements of fact which bear directly on the determination this Court must make in disposing of this Petition. In addition, this Court must be presented with a complete picture of the procedural framework within which land use decisions are made and reviewed in the State of Oregon.

Petitioner's failure to exhaust available remedies in the state review system precludes the bringing to this Court of all but the single issue presented by Respondent in its restated Question for Review. The case as presented in the Petition at best demonstrates a misunderstanding of the Oregon land use system and at worst is an effort by Petitioner to seek review of issues which have been waived through the state review process.

A. City Decision, City Law

Petitioner had burden to show compliance with city standards. City law required dedication of property. Petitioner presented no evidence on issue of development impacts. Only evidence in city record supports findings on impacts.

Petitioner seeks review of the decision of the Oregon Supreme Court to affirm the decisions of the Oregon Court of Appeals and the Oregon Land Use Board of Appeals (LUBA) in which each rejected all of Petitioner's assignments of error related to the City's decision to grant conditional site development approval to an application for a major modification of an existing commercial development.[1,2]

Site development review is applicable to all major modifications of existing developments.[3] A modification to an existing development which increases the intensity of use through creation of more parking spaces or construction of a larger building is a major modification.[4] It has not been disputed by Petitioner that the proposed development will create the impacts found by the City

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[1] The actual Assignments of Error presented to LUBA and the Oregon Court of Appeals are reproduced as Appendix "A".

[2] The project description and background can be found at Petition, D-3, 4; G-6 through G-11.

[3] Tigard, OR., Community Development Code tit. 18, ch. 120, Section 020A (1990). Tigard Community Development Code sections are cited in the following format: CDC § 18.xxx.xxx. The text of CDC § 18.120.020A is reproduced in its entirety in Appendix "B", B-1.

[4] CDC § 18.120.070, reproduced at Appendix "B", B-2 through B-4.

and is properly classified as a major modification to their existing development.

The first phase of the proposed expansion will double the size of the existing commercial structure, and includes a 39 stall parking lot, with a later second phase to further increase the intensity of development on the site. The City Council made specific findings addressing the impacts of the proposed development and the relationship between those impacts and the required dedication of land for greenway, storm drainage, and pedestrian/bicycle path purposes.[5] The Council found that there would be an increase in traffic to and from the site due to the increase in intensity of the commercial operation, and that the increase in traffic would have an impact on the City's multi-model transportation system. The Council further found that the proposed development would increase the area of impervious surface on this site resulting in increased stormwater run off into the Fanno Creek drainage system.

Petitioner's application was evaluated in a hearing process that is similar to an administrative law "contested case" hearing. The City is the decision-make and not a party to the proceeding. Petitioner, who was represented by legal counsel during the two separate evidentiary proceedings before the City, presented no evidence on the issue of impacts. In order for the City to approve a site development review application, it must conclude that all

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[5] The relevant findings of the City were quoted in the Oregon Supreme Court Opinion, reproduced at Petition, A-5 through A-8; the full findings document reproduced as Appendix "G" of the Petition.

applicable city standards have been satisfied. CDC § 18.32.250A,E; CDC § 18.120.180.[6] It was the burden of the Petitioner to establish that all city standards were met. CDC § 18.32.250A.[7] The relevant approval standard reads:

> "8. Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." CDC § 18.120.180 A.8.

Petitioner's failure to meet her burden of proof resulted in the conditioning of the approval in lieu of denial. The City has the authority to grant a site development review approval upon compliance with conditions designed to insure conformance of the application with city standards. CDC § 18.32.250E.1.[8] Without the attachment of the condition, the City would have been forced to deny the application for failure to meet all applicable standards. The condition which gives rise to Petitioner's challenge reads:

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e.,

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[6] Text reproduced at Appendix "B", B-14 through B-18; B-4 through B-14.

[7] Text reproduced at Appendix "B", B-14.

[8] Text reproduced at Appendix "B", B-16.

> all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area. STAFF CONTACT: Chris Davies, Engineering Division." Petition, G-43,44.

This condition was made a part of the approval because the site development review documents submitted by Petitioner did not show dedication of this property. The condition does not result in any change in the size or scope of Petitioner's proposed expansion. The land in the floodplain, which could not be developed due to other city regulations, is counted toward meeting the landscaping requirement for the project. Petition, G-28 through G-30; G-44,45.

LUBA found that the City had adopted a comprehensive master drainage plan providing for the use of the Fanno Creek greenway in the management of storm water runoff. Petition, D-16. The specific findings on storm drainage dedication requirements are found in the Petition, G-36 through G-41. The dedication requirement for storm drainage purposes is predicated upon the conclusions of the City's master drainage plan and the policy sections of the City's comprehensive plan regarding the cumulative impacts of development on the drainage system.

B. Oregon Framework for Review of City Land Use Decisions

Courts are bound by local finding supported by substantial evidence in the whole record. Petitioner must present all issues at LUBA, or they are waived.

The framework for review of local land use decisions in Oregon is fixed by the provisions of Oregon Revised Statutes (ORS) Chapter 197. These statutes require considerable judicial deference to factual determinations made by cities as a part of a land use application review process. To the extent that a necessary factual justification is relevant in this proceeding, Oregon state law limits direct judicial review of that justification. That restraint exists for constitutional factual questions as well as any other factual question. *See*, e.g. *Younger v. City of Portland*, 752 P.2d 262 (Or. 1988).

LUBA is the initial body to review a local government land use decision and has exclusive jurisdiction over such decisions. ORS 197.825(1).[9] LUBA could have reversed or remanded this city decision on a factual issue only if the decision was not supported by substantial evidence in the whole record. ORS 197.828(2)(a); 197.835(7)(a)(C).[10] Factual findings made by a local government are presumed to be true if supported by substantial evidence in the record, even if a reviewing court would draw a different conclusion from the same evidence. *Younger v. City of Portland*, 752 P.2d at 270. Constitutional questions of factual relationships are no

[9] Text reproduced at Appendix "C", C-1.

[10] Text reproduced at Appendix "C", C-2; C-5.

different. The City's factual determination on public service needs generated by a proposed development are binding if supported by substantial evidence in the whole record. ORS 197.830(13)(b).[11]

When there are disputed allegations of unconstitutionality of a land use decision, LUBA is allowed to take evidence and make findings of fact on those disputed allegations. ORS 197.830(13)(b).[12] The evidentiary hearing before LUBA can establish factual issues about an alleged taking of property without just compensation not shown in the local government record. *Dunn v. City of Redmond*, 735 P.2d 609 (Or. 1987). Petitioner did not request an evidentiary hearing before LUBA in this case, a critical fact omitted in the Petition.

It is the policy of the Oregon land use system that land use decisions implementing plans and standards are to be made at the local level consistent with statewide planning goals. ORS 197.005(3).[13] A party will not be able to raise an issue in the appeal process if that issue was not first raised at the local level. ORS 197.835(2).[14]

[11] Text reproduced at Appendix "C", C-11.

[12] Text reproduced at Appendix "C", C-11.

[13] Text reproduced at Appendix "C", C-13.

[14] Text reproduced at Appendix "C", C-3,4.

C. Issues Not Contested by Petitioner in State Review System

Petitioner did not challenge city findings on impacts or evidentiary support for findings. Petitioner did not challenge city standards, the existence of a "nexus" between standards and condition, nor economic impact of condition. No due process challenge to Oregon land use system made.

In order for LUBA, the Oregon Court of Appeals or the Oregon Supreme Court to consider an issue, that issue must be assigned as error at each step in the proceedings. *Mullenaux v. Oregon Dept. of Rev.*, 651 P.2d 724 (Or. 1982); ORAP 5.45, 4.60, 4.05.[15] With regard to the issues raised before LUBA in this case, the Board found:

> "Petitioners generally argue under these assignments of error that the proposed development is 'in no way related to' or 'not related to' the challenged dedication requirement. [LUBA] Petition for Review 11, 14. *However, petitioners do not challenge the adequacy of the above quoted findings or their evidentiary support in the record.* Therefore, for purposes of evaluating petitioners' constitutional taking claims, we assume that the facts found by the city concerning the impacts of the proposed development and the need for storm water management and alternative means of transportation are

[15] Oregon Rules of Appellate Procedure (ORAP), text reproduced at Appendix "D", D-1 through D-3; Petitioner must include sufficient argument to explain assignments of error. Expression of general disagreement with decision is not enough. *Camp v. Josephine Co.*, 23 Or. LUBA 6 (1992).

> valid, and consider only whether these facts are legally sufficient to establish the requisite relationship between the impacts of the proposed development and the exaction imposed." *Dolan v. City of Tigard*, 22 Or. LUBA 617, 622 (1992) (Emphasis added).[16]

In addition LUBA found:

> "Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the 'nexus' between these *legitimate public purposes* and the *condition* imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationships between the *impacts* of the proposed development and the *exactions* imposed are insufficient to justify requiring dedication of petitioners' property without compensation." *Dolan*, 22 Or. LUBA 617, 621 (1992) (Emphasis in original).[17]

It is significant that this analysis of Petitioner's case by LUBA was relied upon by the Oregon Supreme Court in its statement framing the issues presented by Petitioner. Petition, A-7 through A-9.

[16] Petition, D-10.

[17] Petition, D-7,8.

A fair reading of the Petition leaves the impression that Petitioner is asserting an attack on the City's factual findings, and that it would be appropriate at this stage of proceedings for this Court to review those findings. That is simply not the case. Petitioner's opportunity to challenge the findings and evidence occurred at LUBA; she chose not to take advantage of that opportunity.

The Oregon Court of Appeals and the Oregon Supreme Court recognized the limited nature of the issue raised by Petitioner in this matter. Because Petitioner has conceded that her development has a direct impact on the City's transportation and storm drainage system, this Court, like the Oregon Courts, are bound by the City's factual findings.

Just as importantly, Petitioner has *never* contended that the City's regulations relating to storm water management and its transportation system do not fulfill legitimate public purposes. She has never alleged she is not left with an economically viable use of her land after the dedication occurs. Nor has she ever challenged the sufficiency of the connection or "nexus" between these conceded legitimate public purposes and the regulations which required the imposition of the condition. It was the failure of the California Coastal Commission to establish this connection that led to the result in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Because Petitioner conceded these points, those issues were resolved with finality in the state court system.

Petitioner has been represented by legal counsel since the beginning of this case. Petitioner has chosen how to present her case. By not fully presenting her case

she has by-passed the state courts and now asks this Court to render decisions on issues never presented in the state system.

Finally, Petitioner does not now and has never argued that the process provided by the Oregon system is in any way inadequate or unfair. By not presenting a due process challenge to Oregon's land use system, Petitioner has waived her right to raise all but one of the issues presented in this Petition.

D. Oregon Supreme Court Opinion

Oregon Supreme Court identified narrow issue presented. Court correctly explained Nollan holding and why Petitioner's interpretation is wrong. Court found no "per se" taking.

The opinion of the Oregon Supreme Court correctly stated the narrow issue presented by Petitioner through her state appeal.

> "The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioner's proposed land use and the expected impacts of that land use. Petitioners argue that, because city failed to demonstrate an 'essential nexus' or a 'substantial relationship' between the exactions demanded by city and the impacts caused by their proposed development, city's exactions constitute a 'taking' under the Fifth Amendment of the federal constitution. City responds that it need only show a 'reasonable relationship' between the imposition of the conditions and the legitimate public interest advanced." *Dolan v. City of Tigard*,

854 P.2d 437, 438 (Or. 1993) (footnotes omitted).[18]

The court, after summarizing the factual posture of the case, focused upon the unchallenged factual findings of the City and quoted those findings at length. The court, recognizing its limited role in the review of local land use decisions, pointed out that:

> "(Petitioners) did not challenge the adequacy of city's above quoted findings or their evidentiary support in the record. Rather, petitioners argued that city's dedication requirements are not related to their proposed development and, therefore, that those requirements constitute an uncompensated taking of their property under the Fifth Amendment." *Dolan*, 854 P. 2d at 440.[19]

The court's opinion follows the law established by this Court by stating that a land use regulation does not effect a "taking" of property, within the meaning of the Fifth Amendment, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of their land. The court supports this statement of the law by citation to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987) and *Agins v. City of Tiburon*, 447 U.S. 255 (1980). *Dolan*, 854 P.2d at 442.[20]

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[18] Petition, A-2.

[19] Petition, A-7.

[20] The court disposed of Petitioner's "per se" taking argument at footnote 8 by pointing out that such a taking does not occur when the dedication occurs with the owner's permission. The court stated that Petitioner may avoid the physical occupation of her land by withdrawing her application for a development permit. *Dolan*, 854 P.2d at 441 n.8.

In considering the required relationship of the impacts of a development and the exaction, the Oregon Supreme Court concluded that this Court in *Nollan* did not abandon the generally recognized "reasonably related" test and, in fact, noted that its approach was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts," citing *Nollan*, 483 U.S. at 839. The court concluded that Petitioner is wrong in asserting that *Nollan* changed the law on this point. The court, at footnote 9, construed *Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992) as providing authority for its interpretation of *Nollan*. *Dolan*, 854 P.2d at 443 n.9.

Further analyzing *Nollan*, the Oregon Supreme Court interpreted that case as requiring that in order for a regulation to *substantially* advance a legitimate state interest, as required by *Agins*, a reasonable relationship must be shown between the exaction or condition of development, and the regulation which furthers the state interest. *Dolan*, 854 P.2d at 443.

For an exaction to be considered "reasonably related" to an impact, it is necessary to show a nexus between the two. *Dolan*, 854 P.2d at 443.[21] The court found in the

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[21] The exaction is reasonably related to an impact if the exaction serves the same purpose that a denial would serve. See *Dept. of Trans. v. Lundberg*, 825 P.2d 641, *cert. denied*, 113 S. Ct. 467 (1992) (sidewalk dedication requirement serves the same legitimate governmental purposes that would justify denying permits to develop commercially zoned properties).

unchallenged factual findings sufficient justification for the dedication. The condition provides additional capacity for the transportation system, and that requirement is reasonably related to the increased traffic congestion that Petitioner admits will result from her development. The court further found that because the development will cover a much larger portion of the site with buildings and parking, thus increasing the site's impervious area, that the requirement for dedication of property for improvement of the storm drainage system is also reasonably related to the conceded increased run off resulting from the intensification of the use.

Petitioner makes much of the sole dissent to the court's opinion. However, the dissent suffers the same flaw as does the Petition. Each focuses on alleged deficiencies in the City's findings of fact, and the evidentiary support for those findings. Petitioner never challenged the factual findings or evidence, thus making them binding on reviewing courts. The dissent is nothing more than a philosophical statement unrelated to the procedural posture of the case, which ignores the fact that Petitioner accepted the City's findings as her own by failing to challenge them.

Perhaps the reason why Petitioner produced no evidence to contradict the City's findings is that no such evidence could be developed. Whatever the reason, it is clear that through the state appeal process Petitioner agreed with the City's findings that her development has a direct impact on the City's transportation and storm water system. She also agreed with the City's conclusion that the dedication requirement is reasonably related to

the extent of impact of the development on the City's systems and that the City requirements serve legitimate public purposes. Petitioner, like the dissenting Justice, fails to accept that the posture of this case cannot be changed.

The Petition improperly leaves the impression that the sufficiency of the City's findings is an issue before this Court. Petitioner's refusal to challenge the findings at the appropriate point in the state process prevents this Court from addressing the issues which she now attempts to raise.

The Oregon Supreme Court correctly recognized the limited issue presented. Petitioner cannot now expand the scope of this case. The court's analysis of the *Nollan* opinion is consistent with that taken by the Ninth Circuit and with this Court's prior opinions on takings issues in the context of the regulation of land development.

II. REASONS FOR DENYING THE PETITION

A. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW; THE CITY'S DECISION SATISFIES THE REQUIREMENTS OF THE TAKINGS CLAUSE

1. Petitioner misstates facts

Petitioner misrepresents posture of case by not informing the Court of issues waived in state proceedings. Petition contains misstatements of fact.

The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and

adequate understanding of the points requiring consideration by the Court in considering a Writ of Certiorari will be a sufficient reason for denying the Petition. Sup. Ct. R. 14.5. The Petition contains the following inaccurate information:

a. Petitioner states that her land use application met "all standards of approval" and that she was singled out to "finance the cost of" public facilities. Petition, "i". Those statements are false. Petitioner's application did not provide for a dedication in the area within the 100-year floodplain of Fanno Creek. That failure resulted in an application which did not meet a city standard for approval. No financial contribution is required by the City's approval.

b. Petitioner states "the city made findings that failed to directly and substantially demonstrate the increased intensity of the Dolans' use required the exactions." Petition, "i". That statement is false. As explained above, Petitioner has accepted the City's findings and conclusions that the development has a direct and substantial impact on the City's systems and that the exaction is reasonably related to the impacts.

c. In the Statement of the Case, Petitioner has omitted the fact that she has accepted the City's factual findings and conclusions. By doing this, she has mislead this Court into believing that the City's factual findings are at issue in this case.

d. Petitioner states "This is an inverse condemnation action." Petition, 4. That statement is not true. This is an administrative action challenging a city land use approval before the Land Use Board of Appeals. The

authority of LUBA is set by statute. LUBA has no authority to require that the city award just compensation to Petitioner for the property interest dedicated. ORS 197.835.

e. Petitioner states "There was, however, no direct, evidentiary linkage between the development of the Dolans' new store and the exacted dedications." Petition, 7. That statement is false. Petitioner has accepted the City's findings which establish a direct linkage between the development and impacts on the City's transportation and storm water management system.

f. In the Statement of the Case, Petitioner blatantly misstates the nature of the case which they presented in the state system. Petition, 7, n. 2. The Oregon Supreme Court found that Petitioner had not challenged the adequacy of the City's findings or their evidentiary support in the record. Petitioner's attempt to qualify that finding is an outright attempt to distort the nature of the case. Petitioner presented no assignment of error to LUBA which challenged the sufficiency of the City's findings nor their evidentiary support. Petitioner did not assign as error in the Oregon Court of Appeals LUBA's conclusion that the City's findings and evidentiary support were not challenged.[22]

g. Petitioner gives the impression that during oral argument before the Oregon Supreme Court, the City admitted that the condition imposed "bore no relationship whatsoever to the scope or intensity of the impacts

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[22] Petitioner's actual Assignments of Error are reproduced at Appendix "A".

of petitioners' proposed use." Petition, 11. That assertion is false. Petitioner does not provide any excerpt from the Supreme Court argument to support her assertion. In any case, a statement by counsel at argument cannot change the facts of the case. The City's unchallenged findings establish impacts and the relationship between the development and the exaction imposed. During oral argument, and in response to a question concerning the impact issue, counsel for the city did point out that this is a major modification to an existing development that, by definition in the City code, has impacts, and that the undisputed facts of the case establish impacts.

What Petitioner does excerpt is a brief and incomplete portion of an exchange between the presiding judge of the panel of the Oregon Court of Appeals and counsel for the City. That exchange focused upon the language of the city code, and *not* the impacts of the proposed development. That brief excerpt is taken totally out of context, does not support the assertion, and has nothing to do with the issue presented in this case.

h. Petitioner states that the City's decision requires construction of a bikepath. Petition, 13, 14. This statement is false. The City's condition requires only the dedication of land and does not require construction of a path.[23]

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[23] The actual condition reads:
"1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area. STAFF CONTACT: Chris Davies, Engineering Division." Petition, G-43.

i. Petitioner's continuing attack on the sufficiency of the City's findings throughout the Petition misleads this Court into thinking that such an attack is possible at this point in this case. It has been thoroughly explained above that Petitioner has accepted the City's factual findings and the evidentiary support for those findings.

The Petition is filled with factual inaccuracies, is misleading concerning the posture of this case, and misstates Petitioner's position at previous stages in this case. These misrepresentations alone constitute sufficient reason for denying the Petition.

2. Oregon Supreme Court Correctly Interpreted And Applied *Nollan* to City Decision

The Court's opinion correctly rejects Petitioner's argument that *Nollan* changed the "reasonable relationship" standard between the impacts of a development and government exaction.

Petitioner asserts, as she has throughout this entire proceeding at the state level, that the *Nollan* opinion changed the law concerning the level of connection, or nexus, that must exist between the impact of a development and an exaction imposed as a condition of a development approval. The Oregon Supreme Court correctly rejected Petitioner's argument. Because Petitioner has accepted the City's factual findings and conclusions regarding the connection between the impact of this

development and the exaction, this case does not present an opportunity to even address Petitioner's issue. Even applying Petitioner's purported test, the uncontested facts support the conclusion that this development has a direct impact on city systems, and that the exaction is constitutional.

The *Nollan* opinion explicitly recognizes that local governments may impose exactions designed to minimize the impact of a single development, or the cumulated impacts of development, including easements allowing rights of access to the public. *Nollan*, 483 U.S. at 836. Such exactions do not violate the Takings Clause when the local government has in place regulations which substantially advance a legitimate state interest, and when the exaction carries out that legitimate interest. Petitioners admit that the City's regulations serve a legitimate state interest. They also admit the exaction substantially advances that legitimate state interest. The *Nollan* opinion provides no support for Petitioner in her quest to challenge the City's decision.

3. No "Per Se" taking

Petitioners voluntary submission to city land use regulations makes the *Loretto* 'per se' taking analysis not applicable.

The holding of the Oregon Supreme Court is consistent with this Court's decision in *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992).

Yee involved the California Mobile Home Residency Law. The Court concluded that the application of that

state regulation to the petitioner's mobile home park did not constitute a physical invasion and thus, did not warrant the heightened scrutiny established by the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Yee*, 112 S. Ct. at 1528-31.

Justice O'Connor explained that most of the Court's cases interpreting the Takings Clause of the Fifth Amendment fall within two distinct classes. In the first class are cases where the government requires the property owner to submit to a physical occupation of property. In those, the Takings Clause generally requires compensation. The Court stated that the government effects a physical taking *only* when it *requires* the owner to submit to the physical occupation of land. "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). Thus, where the government floods a landowner's property or requires the landowner to accept the forced installation of cable, the Takings Clause requires compensation because the government compelled a physical invasion of the property. *Yee*, 112 S. Ct. at 1528.

In the second class, the government merely regulates the use of property. Compensation is required in these cases only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of economic use of property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See*, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-125 (1978). The first category of cases (physical or per se takings) require courts to apply a clear rule; the second (regulatory takings) require complex factual

assessments of the purpose and economic affects of government actions. *Yee,* 112 S. Ct. at 1526.

This Court determined that the issue before it in *Yee* involved a regulatory taking question and not a physical occupation question. The critical fact that lead the Court to that conclusion was that the petitioners voluntarily rented their land to mobile homeowners. *Yee,* 112 S. Ct. at 1528. They were not compelled by state law to rent property to tenants. Once they choose to do so, however, they became subject to the law, which imposed severe restrictions on petitioner's ability to change the use of his land or to evict tenants. *Id.* "Put bluntly, no government has required any physical invasion of petitioner's property. Petitioner's tenants were invited by petitioners, not forced upon them by the government." *Yee,* 112 S. Ct. at 1528, *citing to Florida Power,* 480 U.S. at 252-253. The Court reaffirmed its statement from *Loretto,* that the Supreme Court has consistently affirmed the state's broad power to regulate the use of land without paying compensation for all economic injuries that such a regulation entails. *Yee,* 112 S. Ct. at 1529.

In this case, Petitioner has failed to accept the fact that when she submitted a development application to intensify the use of her property, she voluntarily subjected the property to the requirements of the City's land use regulations. The City's authority to regulate the use of land is not an issue in this case. Petitioner will not have to comply with the dedication requirement until she takes advantage of the development approval and intensifies the use of her property.

Petitioner has never argued that the City does not have the authority to deny her development application unless she complies with the City's land use regulations. This Court in *Nollan* made clear that a government can regulate the use of land through the imposition of conditions, including conditions which require the dedication of property to public use, so long as the regulation in question substantially advances a legitimate state interest, and the condition implementing that regulation advances the state interest embodied in the regulation. *Nollan,* 483 U.S. at 835-37.

This Court made clear in *Yee* that the class of cases which properly are categorized as "physical taking" or "physical occupation" cases is limited to only those situations in which unilateral action by the government forces a property owner to submit to the physical invasion of their land. In this case Petitioner is not being forced by the government to do anything. If Petitioner does not intensify the use of her land, the government cannot and will not enforce the requirement that she dedicate property for storm water management and transportation purposes. It is only after Petitioner takes advantage of her development approval, and intensifies the use of her land, that she must comply with the City's regulations and dedicate property to assist in mitigating the impacts of the development.

The Oregon Supreme Court gave Petitioner's "physical occupation" argument little attention. The Oregon Supreme Court correctly interpreted *Yee,* and *Loretto,* and correctly applied those holdings from this Court to the facts of this case.

B. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS.

Petitioner claims that the decision of the Oregon Supreme Court directly conflicts with interpretations, by both federal and state courts, of the required nexus between conditions and impacts in light of *Nollan*. Such a claim is unfounded and evidences Petitioner's misunderstanding of the meaning and application of *Nollan*. The Petition illustrates particular confusion about the distinct analyses involved in Takings Clause cases.

Nollan clearly reaffirmed the basic test of *Agins*, "that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'deny an owner economically viable use of his land'." *Nollan*, 483 U.S. at 834, *citing Agins v. Tiburon*, 447 U.S. 255, 260 (1980). At the same time, however, *Nollan* did not impose a more exacting standard on the nexus between such regulation and the impacts of the proposed development. Rather, this Court simply found that the regulation at issue in that case failed to meet even the most lax standard, and noted that its conclusion was consistent with the approach taken by all lower courts aside from the California state courts. *Nollan*, 483 U.S. at 834-35.

Lower court decisions since *Nollan*, including that of the Oregon Supreme Court in this case, illustrate conformity with this approach. In that light, neither this case nor any case cited by Petitioner suggests any basis or need for this Court to address the question presented. Petitioner's references and case summaries, however, consistently illustrate confusion in understanding the distinction between the need to show that the development

condition substantially advances a legitimate state interest and the need to show that the development condition reasonably relates to the impacts of the development.

1. There is no conflict among the federal courts

The case which most clearly illustrates the consistency of lower federal court treatment of this issue is *Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992). That case considered a challenge to an ordinance conditioning certain commercial development on payment of a low income housing fee.

Responding to the argument that *Nollan* had articulated a higher standard for such development fees, the court stated that it was "not persuaded that *Nollan* materially changes the level of scrutiny" to be applied, since the *Nollan* Court had found that "it did not have to decide how close a 'fit' between the conditions and the burden is required." *Commercial Builders*, 941 F.2d at 874. More striking was the court's declaration that of the other circuits which have considered land use conditions since *Nollan*, "[n]one have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land." *Id.* It is therefore ironic that Petitioner should cite the case as standing for the very proposition which the opinion specifically refutes.

The *Commercial Builders* opinion presents a positive statement by a federal appeals court that lower federal

courts have consistently interpreted *Nollan* as not materially changing the level of scrutiny between impact and exaction in Takings Clause cases. Careful review of those cases cited by Petitioner as evidence of conflict shows nothing to the contrary; rather only Petitioner's fundamental misunderstandings about *Nollan*.

Petitioner's reliance on *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), is misplaced. The case is distinguishable because it is a rent control case, not a dedication case, and the court held that a "*Loretto*" type physical taking occurred. *Id. Loretto* is not applicable to the facts of this case. Further, the opinion compares Takings Clause analysis with Due Process analysis. *Id.* at 583. This Court has never explained its Takings Clause analysis as applicable to those under other provisions of the Federal Constitution. Instead, the *Nollan* opinion specifically discounted such a relation. *Nollan*, 483 U.S. at 834 n. 3 ("[O]ur opinions do not establish that these [regulatory taking] standards are the same as those applied to due process or equal protection claims.")

Petitioner's reference to *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399, 1401 (D. Nev. 1990), *rev'd*, 939 F.2d 696 (9th Cir. 1991), is facially inapposite in view of the Ninth Circuit's subsequent reversal on the grounds that the Takings Clause analysis articulated in *Nollan* was inapplicable under the facts of the case. 939 F.2d at 699. Regardless, the reference by Petitioner to the District Court opinion confuses the separate tests involved in Takings Clause analysis. The opinion states that "*Nollan* seems to require a fairly close nexus between the regulatory condition and the underlying governmental purpose." *Leroy Land*, 733 F. Supp. at 1401

(citations omitted). The summary by Petitioner restates this as requiring a "fairly close nexus required between regulatory conditions and burden created by proposed development." Petition, 24. Thus, Petitioner again exhibits fundamental confusion about *Nollan*. The correct analysis for this nexus of development conditions to the state's interest was stated in *Agins*, reaffirmed in *Nollan*, and explicitly followed in this case. Finally, the Ninth Circuit cites its opinion from *Leroy Land* in *Commercial Builders* as authority for the conclusion that *Nollan* did not change the condition/impacts nexus relationship. *Commercial Builders*, 941 F.2d at 874-75.

Petitioner's reference to *Amoco Oil Co. v. Village of Schaumburg*, 1992 WL 229591 (N.D. Ill. September 11, 1992), where the court ordered dismissal for lack of federal jurisdiction, is especially curious. The precedential weight of a District Court case not decided on the merits must be considered nil.

The Petition apparently refers to *Pengilly v. Multnomah County*, 810 F. Supp. 1111 (D. Or. 1992), as proof of lower court confusion after *Nollan*. Given that the opinion merely accepts the possibility, explicitly left open in *Nollan*, 483 U.S. at 835, that the state may use the cumulative impact of development as its rationale for application of a land use condition to a single property owner, the argument that it conflicts with *Nollan* is groundless.

2. There is no conflict with the decisions of state courts

Petitioner cites several state court opinions as evidence of conflict. However, the cases cited again convey only Petitioner's lack of understanding of *Nollan*.

Petitioner's reference to *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) is disingenuous. The quoted material comes not directly from the Court of Appeals, but rather from a commentator, and should have been cited as such by Petitioner.[24] Regardless, Petitioner has confused the relevant test; Petitioner is contending conflict as to the proper relationship of conditions and exactions, but the referenced material is discussing the relationship of conditions and state interests. In addition, the case involves a facial challenge to the ordinance at issue, not a challenge to a condition of development.

Petitioner's reference to *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992) attempts to compare Takings Clause analysis with those under Due Process and Equal Protection. As set out above, *Nollan* expressly repudiated such comparison. *Nollan*, 483 U.S. at 834 n.3. Also, the *Steinbergh* court quoted approvingly the portion of *Commercial Builders* discussed above, rejecting the notion that *Nollan* materially changes the level of scrutiny. *Steinbergh*, 604 N.E.2d at 1276 n. 8. This case is also distinguishable because it is a challenge to a rent control ordinance, not a condition of development.

[24] Petition, 23.

In *Surfside Colony, Ltd. v. California Coastal Com.*, 277 Cal. Rptr. 371 (Cal. Ct. App. 1991), the court discussed a pre-*Nollan* California taking case that had employed the "rational basis" test. It is important to remember that *Nollan* explicitly stated the consistency of its approach with that "taken by every other court that has considered the question, *with the exception of the California state courts.*" *Nollan*, 483 U.S. at 839, (emphasis added) (citations omitted). Indeed, within the California state courts, *Nollan* had changed the analysis. Thus, Petitioner's quotation from *Surfside* is again disingenuous and misleading. The full quote - "it is clear that the rational basis test employed by *Whaler's Village* no longer controls" - is not disputed by Respondent; indeed, it is endorsed. *Surfside*, 277 Cal. Rptr. at 377. The Court also disposed of the merits on the basis of a lack of substantial evidence, which factually distinguishes it from this case.

Petitioner quotes from *Batch v. Town of Chapel Hill*, 376 S.E.2d 22 (N.C. Ct. App. 1989), *rev'd on other grounds*, 387 S.E.2d 655 (N.C. 1990), but fails to note that it was decided on state law grounds "based on the principles enunciated in *Nollan*, the rationale of the North Carolina subdivision enabling statute, and the policy underlying the map act." *Batch*, 376 S.E.2d at 34. This case is distinguishable because it was decided on independent state grounds.

Petitioner's reference to *Bernardsville Quarry v. Bernardsville Borough*, 608 A.2d 1377 (N.J. 1992) is also disingenuous. The quoted material was not set out by the

court in the context of a constitutional test.[25] Regardless, the entire opinion contains no interpretative analysis of *Nollan*, which is cited only once in passing.

CONCLUSION

The rhetoric of the Petition overwhelms the reality of this case. Petitioners underlying premise, that *Nollan* changed the required relationship between the impacts of a development and a local government exaction is wrong. The Petition misstates the nature of this case, relies on faulty analysis of this Court's opinions, and asserts the existence of conflicts among lower court decisions where none exists. The Oregon Supreme Court correctly and succinctly rejected Petitioner's theory and this Court should do the same by denying the Petition.

DATED this 4th day of November, 1993.

Respectfully submitted,

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[25] Petition, 25 through 26.

APPENDIX A

ASSIGNMENTS OF ERROR

Dolan v City of Tigard
LUBA No. 90-092

Assignment of Error No. 1

The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year floodplain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions.

Assignment of Error No. 2

The city council's exaction of all portions of Petitioners' property falling within the 100-year floodplain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions.

Assignment of Error No. 3

The city's requirement that the "roof sign" be removed within 45 days of occupancy of the new building was unreasonable and hence a denial of due process.

Dolan v City of Tigard
LUBA No. 91-161

Assignment of Error No. 1

The City's decision to demand the dedication to the City of those portions of Petitioners' land

lying 15 feet to the east of the 100-year floodplain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions.

Assignment of Error No. 2

The City Council's exaction of all portions of Petitioners' property falling within the 100-year floodplain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions.

Assignment of Error No. 3

The City has characterized an existing wall sign as a "roof sign." By mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process.

Dolan v City of Tigard
Court of Appeals
CA No. A73769

Assignment of Error No. 1

LUBA erred by failing to hold that the city, by denying the Petitioners' variance, in violation of Article I section 18 of the Oregon Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution, took, without payment of just compensation, the private property of Petitioners by requiring the dedication of private property of the Petitioners for permanent physical occupation by the public as a pedestrian/bicycle pathway.

Assignment of Error No. 2

LUBA erred by affirming the city's denial of the Petitioners' variance. The city's decision was in violation of the Fifth and Fourteenth Amendments of the United States Constitution, taking, without payment of just compensation, the private property of Petitioners. The city's decision required the dedication, without a showing of a substantial relationship between the proposed use and the dedication exaction, the private property of the Petitioners for public use as a greenway and a pedestrian/bicycle pathway.

APPENDIX B

18.120.020 Applicability of Provisions

A. Site development review shall be applicable to all new developments and major modification of existing developments, as provided in Section 18.120.070 except it shall not apply to:

1. Single-family detached dwellings;
2. Manufactured homes on individual lots;
3. A duplex, which is not being reviewed as part of any other development;
4. Minor modifications as provided in Section 18.120.070;
5. Any proposed development which has a valid conditional use approved through the conditional use permit application process; or
6. Mobile home parks and subdivisions;
7. Family day care;
8. Home occupation;
9. Temporary use;
10. Fuel tank; or
11. Accessory structures. (Ord. 90-41; Ord. 89-06; Ord. 87-66; Ord. 84-61; Ord. 84-50; Ord. 83-52)

18.120.070 Major Modification to Approved Plans or Existing Development

A. An applicant may request approval of a modification to an approved plan or existing development by:

1. Providing the Director with three copies of the proposed modified site development plan; and
2. A narrative which indicates the rationale for the proposed modification addressing the changes listed in subsection B below.

B. The Director shall determine that a major modification(s) will result if one or more of the following changes are proposed. There will be:

1. An increase in dwelling unit density, or lot coverage for residential development;
2. A change in the ratio or number of different types of dwelling units;
3. A change that requires additional on-site parking in accordance with Chapter 18.106;
4. A change in the type of commercial or industrial structures as defined by the Uniform Building Code;
5. An increase in the height of the building(s) by more than 20 percent;
6. A change in the type and location of accessways and parking areas where off-site traffic would be affected;

7. An increase in vehicular traffic to and from the site and the increase can be expected to exceed 20 vehicles per day;

8. An increase in the floor area proposed for a nonresidential use by more than 10 percent excluding expansions under 5,000 square feet;

9. A reduction in the area reserved for common open space and/or usable open space which reduces the open space area below the minimum required by this code or reduces the open space area by more than 10 percent;

10. A reduction of project amenities below the minimum established by this code or by more than 10 percent where specified in the site plan:

    a. Recreational facilities;

    b. Screening; and/or

    c. Landscaping provisions; and

11. A modification to the conditions imposed at the time of site development review approval which are not the subject of B. 1 through 10 above of this subsection.

C. Upon determining that the proposed modification to the site development plan is a major modification, the applicant shall submit a new application in accordance with Sections 18.120.030 and 18.120.090 for site development review prior to any issuance of building permits.

D. The Director's decision may be appealed as provided by Subsection 18.32.310.A. Notice of the Director's decision need not be given. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

18.120.180 Approval Standards

A. The Director shall make a finding with respect to each of the following criteria when approving, approving with conditions, or denying an application:

1. Provisions of the following chapters:

    a. Chapter 18.84, Sensitive Lands;

    b. Chapter 18.94, Manufactured/ Mobile Home Regulations;

    c. Chapter 18.92, Density Computation;

    d. Chapter 18.144, Accessory Use and Structures;

    e. Chapter 18.96, Additional Yard Area Requirements;

    f. Chapter 18.98, Building Height Limitations; Exceptions;

    g. Chapter 18.100, Landscaping and Screening;

    h. Chapter 18.102, Visual Clearance Areas;

    i. Chapter 18.106, Off-Street Parking and Loading;

j. Chapter 18.108, Access, Egress, and Circulation;

k. Chapter 18.114, Signs;

l. Chapter 18.150, Tree Removal; and

m. Chapter 18.164, Street and Utility Improvement Standards.

2. Relationship to the Natural and Physical Environment:

a. Buildings shall be:

(i) Located to preserve existing trees, topography, and natural drainage;

(ii) Located in areas not subject to ground slumping or sliding;

(iii) Located to provide adequate distance between adjoining buildings for adequate light, air circulation, and firefighting; and

(iv) Oriented with consideration for sun and wind; and

b. Trees having a six inch caliper or greater shall be preserved or replaced by new plantings of equal character; and

3. Exterior Elevations:

a. Along the vertical face of single-family attached and multiple-family structures, offsets shall occur at a minimum of every 30 feet by providing any two of the following:

(i) Recesses (decks, patios, entrances, floor area, etc.), of a minimum depth of eight feet;

(ii) Extensions (decks, patios, entrances, floor area, etc.) of a minimum depth of eight feet, a maximum length of an overhang shall be 25 feet; and

(iii) Offsets or breaks in roof elevations of three or more feet in height;

4. Buffering, Screening, and Compatibility between Adjoining Uses:

a. Buffering shall be provided between different types of land uses (for example, between single-family and multiple-family residential, and residential and commercial), and the following factors shall be considered in determining the adequacy of the type and extent of the buffer:

(i) The purpose of the buffer, for example to decrease noise levels, absorb air pollution, filter dust, or to provide a visual barrier;

(ii) The size of the buffer required to achieve the purpose in terms of width and height;

(iii) The direction(s) from which buffering is needed;

(iv) The required density of the buffering; and

(v) Whether the viewer is stationary or mobile;

b. On site screening from view from adjoining properties of such things as service areas, storage areas, parking lots, and mechanical devices on roof tops, i.e., air cooling and heating systems, shall be provided and the following factors will be considered in determining the adequacy of the type and extent of the screening:

(i) What needs to be screened;

(ii) The direction from which it is needed;

(iii) How dense the screen needs to be;

(iv) Whether the viewer is stationary or mobile; and

(v) Whether the screening needs to be year around;

5. Privacy and Noise:

a. Structures which include residential dwelling units shall provide private outdoor areas for each ground floor unit which is screened from view by adjoining units as provided in Subsection 6.a below;

b. The buildings shall be oriented in a manner which protects private

spaces on adjoining properties from view and noise;

c. Residential building shall be located on the portion of the site having the lowest noise levels; and

d. On-site uses which create noise, lights, or glare shall be buffered from adjoining residential uses; (See Section 18.120.180.A.4)

6. Private Outdoor Area: Residential Use:

a. Private open space such as a patio or balcony shall be provided and shall be designed for the exclusive use of individual units and shall be at least 48 square feet in size with a minimum width dimension of four feet; and;

(i) Balconies used for entrances or exits shall not be considered as open space except where such exits or entrances are for the sole use of the unit; and

(ii) Required open space may include roofed or enclosed structures such as a recreation center or covered picnic area;

b. Wherever possible, private outdoor open spaces should be oriented toward the sun; and

c. Private outdoor spaces shall be screened or designed to provide privacy for the users of the space;

7. Shared Outdoor Recreation Areas: Residential Use:

   a. In addition to the requirements of subsections 5 and 6 above, usable outdoor recreation space shall be provided in residential developments for the shared or common use of all the residents in the following amounts;

      (i) Studio up to and including two-bedroom units, 200 square feet per unit; and

      (ii) Three or more bedroom units, 300 square feet per unit;

   b. The required recreation space may be provided as follows:

      (i) It may be all outdoor space; or

      (ii) It may be part outdoor space and part indoor space; for example, an outdoor tennis court, and indoor recreation room;

      (iii) It may be all public or common space;

      (iv) It may be part common space and part private; for example, it could be an outdoor tennis court, indoor recreation room and balconies on each unit; and

      (v) Where balconies are added to units, the balconies shall not be less than 48 square feet;

   c. Shared outdoor recreation space shall be readily observable for reasons of crime prevention and safety;

8. Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

9. Demarcation of Public, Semipublic, and Private Spaces: Crime Prevention:

   a. The structures and site improvements shall be designed so that public areas such as streets or public gathering places, semipublic areas and private outdoor areas are clearly defined in order to establish persons having a right to be in the space, in order to provide for crime prevention and to establish maintenance responsibility; and

   b. These areas may be defined by;

      (i) A deck, patio, low wall, hedge, or draping vine;

      (ii) A trellis or arbor;

(iii) A change in level;

(iv) A change in the texture of the path material;

(v) Sign; or

(vi) Landscaping;

10. Crime Prevention and Safety:

a. Windows shall be located so that areas vulnerable to crime can be surveyed by the occupants;

b. Interior laundry and service areas shall be located in a way that they can be observed by others;

c. Mail boxes shall be located in lighted areas having vehicular or pedestrian traffic;

d. The exterior lighting levels shall be selected and the angles shall be oriented towards areas vulnerable to crime; and

e. Light fixtures shall be provided in areas having heavy pedestrian or vehicular traffic and in potentially dangerous areas such as parking lots, stairs, ramps, and abrupt grade changes:

(i) Fixtures shall be placed at a height so that light patterns overlap at a height of seven feet which is sufficient to illuminate a person;

11. Access and Circulation:

a. The number of allowed access points for a development shall be as provided in Section 18.108.070;

b. All circulation patterns within a development shall be designed to accommodate emergency vehicles; and

c. Provisions shall be made for pedestrianways and bicycleways if such facilities are shown on an adopted plan;

12. Public Transit:

a. Provisions within the plan shall be included for providing for transit if the development proposal is adjacent to existing or proposed transit route;

b. The requirements for transit facilities shall be based on:

(i) The location of other transit facilities in the area; and

(ii) The size and type of the proposal;

c. The following facilities may be required after City and Tri-Met review:

(i) Bus stop shelters;

(ii) Turnouts for buses; and

(iii) Connecting paths to the shelters;

13. Parking:

    a. All parking and loading areas shall be designed in accordance with the requirements set forth in Sections 18.106.050 and 18.106.090. Chapters 18.102, Visual Clearance, and 18.108, Access, Egress, and Circulation;

14. Landscaping:

    a. All landscaping shall be designed in accordance with the requirements set forth in Chapter 18.100.

    b. In addition to the open space and recreation area requirements of subsections 5 and 6 above, a minimum of 20 percent of the gross area including parking, loading and service areas shall be landscaped; and

    c. A minimum of 15 percent of the gross site area shall be landscaped;

15. Drainage:

    a. All drainage plans shall be designed in accordance with the criteria in the adopted 1981 master drainage plan;

16. Provision for the Handicapped:

    a. All facilities for the handicapped shall be designed in accordance with the requirements set forth in ORS Chapter 487; and

17. Signs:

    a. All sign placement and construction shall be designed in accordance with requirements set forth in Chapter 18.114.

18. All of the provisions and regulations of the underlying zone shall apply unless modified by other sections or this title (e.g., the Planned Development, Chapter 18.80.; or a Variance granted under Chapter 18.134; etc.) (Ord. 90-41; Ord. 89-06; Ord. 84-29; Ord. 83-52)

18.32.250 The Decision Process of the Approval Authority

A. The decision shall be based on:

    1. Proof by the applicant that the application fully complies with:

        a. The City of Tigard comprehensive plan; and

        b. The relevant approval standard found in the applicable chapter(s) of this title or other applicable implementing ordinances;

    2. The standards and criteria that were applicable at the time the application was determined to be complete at such time as the City's plan and applicable ordinances are acknowledged.

B. Consideration may also be given to:

1. Proof of a change in the neighborhood or community or a mistake in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application; and

2. Factual oral testimony or written statements from the parties, other persons and other governmental agencies relevant to the existing conditions, other applicable standards and criteria, possible negative or positive attributes of the proposal or factors in Subsections A or B.1 of this section.

C. In all cases, the decision shall include a statement in a form addressing the requirements of Subsection 18.32.060.A.3.b which refers to the Director's staff report.

D. The approval authority may:

1. Adopt findings and conclusions contained in the staff report;

2. Adopt findings and conclusions of a lower approval authority;

3. Adopt its own findings and conclusions;

4. Adopt findings and conclusions submitted by any party provided all parties have had an opportunity to review the findings and comment on the same; or

5. Adopt findings and conclusions from another source, either with or without

modification, having made a tentative decision, and having directed staff to prepare findings for review and to provide an opportunity for all parties to comment on the same.

E. The decision may be for denial, approval, or approval with conditions, pursuant to subsection 2 of this section.

1. Conditions may be imposed where such conditions are necessary to:

a. Carry out applicable provisions of the Tigard comprehensive plan;

b. Carry out the applicable implementing ordiances; and

c. Ensure that adequate public services are provided to the development or to ensure that other required improvements are made;

2. Conditions may include, but are not limited to;

a. Minimum lot sizes;

b. Larger setbacks;

c. Preservation of significant natural features; and

d. Dedication of easements;

3. Conditions of approval shall be fulfilled within the time limit set forth in the decision or, if no time limit is set forth, within one year. Failure to fulfill any condition of approval within the time limitations provided may be grounds for revocation of approval,

after notice and an opportunity to be heard as an administrative action;

4. Changes, alterations or amendments to the substance of the conditions of approval shall be processed as a new administrative action;

5. Prior to the commencement of development, i.e. the issuance of any permits or the taking of any action under the approved development application, the owner and any contract purchasers of the property which is the subject of the approved application, may be required to sign and deliver to the Director their acknowledgment and consent to such conditions;

6. The conditional approval may require the owner of the property to sign within a time certain or, if no time is designated, within a reasonable time, a contract with the City for enforcement of the conditions and:

   a. The Council shall have the authority to execute such contracts on behalf of the City;

   b. If a contract is required by a conditional approval, no building permit shall be issued for the use covered by the application until the executed contract is recorded in a real property record of the applicable County and filed in the County records; and

   c. Such contracts shall be enforceable against the signing parties, their

heirs, successors and assigns by the City by appropriate action in law or suit in equity for the benefit of public health, safety, and welfare; and

7. A bond in a form acceptable to the Director or, upon appeal or review by the appropriate approval authority, a cash deposit from the property owners or contract purchasers in such an amount as will ensure compliance with the conditions imposed pursuant to the Section, may be required. Such bond or deposit shall be posted prior to the issuance of a building permit for the use covered by the application.

F. The final decision on the application may grant less than all of the parcel which is the subject of the application. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

APPENDIX C

197.825 Jurisdiction of board; limitations; effect on circuit court jurisdiction. (1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the board shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

(2) The jurisdiction of the board:

(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review;

(b) Is subject to the provisions of ORS 197.850 relating to judicial review by the Court of Appeals;

(c) Does not include those matters over which the department has review authority under ORS 197.430 to 197.455 and 197.649 and 197.650;

(d) Does not include those land use decisions of a state agency over which the Court of Appeals has jurisdiction for initial judicial review under ORS 183.400, 183.482 or other statutory provisions;

(e) Does not include any rules, programs, decisions, determinations or activities carried out under ORS 527.610 to 527.770, 527.990 (1) and 527.992; and

(f) Is subject to ORS 196.115 for any county land use decision that may be reviewed by the Columbia River Gorge Commission pursuant to sections 10(c) or 15(a)(2) of the Columbia River Gorge National Scenic Area Act, P.L. 99-663.

(3) Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:

(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015 (10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and

(b) To enforce orders of the board in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order. [1983 c.827 §30; 1987 c.729 §14; 1987 c.856 §9; 1987 c.919 §4; 1989 c.761 §11; 1991 c.817 §4]

197.828 Board review of limited land use decision. (1) The Land Use Board of Appeals shall either reverse, remand or affirm a limited land use decision on review.

(2) The board shall reverse or remand a limited land use decision if:

(a) The decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision;

(b) The decision does not comply with applicable provision of the land use regulations;

(c) The decision is:

(A) Outside the scope of authority of the decision maker; or

(B) Unconstitutional; or

(d) The local government committed a procedural error which prejudiced the substantial rights of the petitioner. [1991 c.817 §2]

Note: 197.828 was added to and made a part of ORS chapter 197 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

197.835 Scope of review. (1) The board shall review the land use decision or limited land use decision and prepare a final order affirming, reversing or remanding the land use decision or limited land use decision. The board shall adopt rules defining the circumstances in which it will reverse rather than remand a land use decision or limited land use decision that is not affirmed.

(2) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. A petitioner may raise new issues to the board if:

(a) The local government failed to follow the requirements of ORS 197.763; or

(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the

notice of the proposed action did not reasonably describe the local government's final action.

(3) The board shall reverse or remand a land use decision not subject to an acknowledged comprehensive plan and land use regulations if the decision does not comply with the goals. The board shall reverse or remand a land use decision or limited land use decision subject to an acknowledged comprehensive plan or land use regulation if the decision does not comply with the goals and the commission has issued an order under ORS 197.320 or adopted a new or amended goal under ORS 197.245 requiring the local government to apply the goals to the type of decision being challenged.

(4) The board shall reverse or remand an amendment to a comprehensive plan if the amendment is not in compliance with the goals.

(5) The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:

(a) The regulation is not in compliance with the comprehensive plan; or

(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals.

(6) The board shall reverse or remand a decision involving the application of a plan or land use regulation provision if the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations.

(7) In addition to the review under subsections (1) to (6) of this section, the board shall reverse or remand the land use decision under review if the board finds:

(a) The local government or special district:

(A) Exceeded its jurisdiction;

(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

(C) Made a decision not supported by substantial evidence in the whole record;

(D) Improperly construed the applicable law; or

(E) Made an unconstitutional decision; or

(b) The state agency made a decision that violated the goals.

(8) The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds, based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances. If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government.

(9)(a) Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830

(14), the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) to (7) of this section or limited land use decision described in ORS 197.828 and 197.195.

(b) Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.

(10) The board may reverse or remand a land use decision under review due to ex parte contacts or bias resulting from ex parte contacts with a member of the decision-making body, only if the member of the decision-making body did not comply with ORS 215.422 (3) or 227.180 (3), whichever is applicable.

(11) Subsection (10) of this section does not apply to reverse or remand of a land use decision due to ex parte contact or bias resulting from ex parte contact with a hearings officer.

(12) The board shall reverse or remand a land use decision or limited land use decision which violates a commission order issued under ORS 197.328.

(13) In cases in which a local government provides a quasi-judicial land use hearing on a limited land use decision, the requirements of subsections (10) and (11) of this section apply. [1983 c.827 §§32, 32a; 1985 c.811 §15;

1987 c.729 §2; 1989 c.648 §57; 1989 c.761 §13; 1991 c.817 §13]

197.830 Review procedures; standing; deadlines; issues subject to review; attorney fees and costs; publication of orders. (1) Review of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals.

(2) Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

(b) Appeared before the local government, special district or state agency orally or in writing.

(3) If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(4) If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(5)(a) Except as provided in paragraph (b) of this subsection, the appeal period described in subsection (3) of this section shall not exceed three years after the date of the decision.

(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.763, 197.195, 215.416 (11) or ORS 227.175 (10) is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply.

(6)(a) Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be

made a party to the review proceedings, as set forth in subsection (1) of this section, are:

(A) The applicant who initiated the action before the local government, special district or state agency; or

(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

(7) If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent's brief is due.

(8) A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $50 and a deposit for costs to be established by the board. If a petition for review is not filed with the board as required in subsections (9) and (10) of this section, the filing fee and deposit shall be awarded to the local government, special district or state agency as cost of preparation of the record.

(9) Within 21 days after service of the notice of intent to appeal, the local government, special district or state agency shall transmit to the board the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections to the record.

(10) A petition for review of the land use decision or limited land use decision and supporting brief shall be filed with the board as required by the board under subsection (12) of this section. Issues shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues to the board if:

(a) The local government failed to follow the requirements of ORS 197.763; or

(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action.

(11) The petition shall include a copy of the decision sought to be reviewed and shall state:

(a) The facts that establish that the petitioner has standing.

(b) The date of the decision.

(c) The issues the petitioner seeks to have reviewed.

(12)(a) The board shall adopt rules establishing deadlines for filing petitions and briefs and for oral argument.

(b) At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes.

(13)(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.

(b) In the case of disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record.

(14) The board shall issue a final order within 77 days after the date of transmittal of the record. If the order is not issued within 77 days the applicant may

apply in Marion County or the circuit court of the county where the application was filed for a writ of mandamus to compel the board to issue a final order.

(15)(a) Upon entry of its final order the board may, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the local government, special district or state agency whose decision is under review. The deposit required by subsection (8) of this section shall be applied to any costs charged against the petitioner.

(b) The board may also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded, and primarily for a purpose other than to secure appropriate action by the board.

(16) Orders issued under this section may be enforced in appropriate judicial proceedings.

(17) The board shall provide for the publication of its orders that are of general public interest in the form it deems best adapted for public convenience. The publications shall constitute the official reports of the board. The board shall provide the publisher with a list of those public officers who shall receive the publications without charge. The board shall determine the sale prices, and all moneys collected or received from sales shall be paid into the Board Publications Account established by ORS 197.832.

(18) Except for those sums collected for publication of board opinions, all fees collected by the board under

this section that are not awarded as costs shall be paid over to the State Treasurer to be credited to the General Fund. [1983 c.827 §31; 1985 c.119 §3; 1987 c.278 §1; 1987 c.729 §16; 1989 c.761 §12; 1991 c.817 §7]

197.005 Legislative findings. The Legislative Assembly finds that:

(1) Uncoordinated use of lands within this state threaten the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.

(2) To promote coordinated administration of land uses consistent with comprehensive plans adopted throughout the state, it is necessary to establish a process for the review of state agency, city, county and special district land conservation and development plans for compliance with goals.

(3) Except as otherwise provided in subsection (4) of this section, cities and counties should remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions.

(4) The promotion of coordinated statewide land conservation and development requires the creation of a statewide planning agency to prescribe planning goals and objectives to be applied by state agencies, cities, counties and special districts throughout the state. [1973 c.80 §1; 1977 c.664 §1; 1981 c.748 §21]

APPENDIX D

RULE 5.45 ASSIGNMENTS OF ERROR

(1) Assignments of error are required in all opening briefs of appellants and cross-appellants.

(2) No matter assigned as error will be considered on appeal unless it was preserved in the lower court and assigned as error in the party's opening brief; provided that the appellate court may consider errors of law apparent on the face of the record.

(3) An assignment of error that would require the court to search for the pertinent portion of the record in which the matter complained of appears shall not be considered.

(4) Each assignment of error shall be clearly and concisely stated under a separate and appropriate heading, must be specific and must set out verbatim the pertinent portions of the record, if it relates to a specific ruling that is being challenged.

(5) The arrangement and form of assignments of error, together with reference to pages of the transcript or narrative statement, should conform to the illustrations in Appendix H.

(6) A separate argument shall follow each assignment of error, except that if several assignments of error present essentially the same legal question, the argument in support of them shall be combined so far as practicable. At the beginning of each argument the appellant

shall identify the applicable standard of review,[1] followed by citation to the statute, case law or other legal authority for that standard of review.

(7) A brief not complying with these rules may be stricken in whole or in part.

[Adopted effective January 1, 1990.]

B. JUDICIAL REVIEW OF FINAL ORDERS OF THE LAND USE BOARD OF APPEALS (LUBA)

RULE 4.60 IN GENERAL

Insofar as practicable, and except where some other procedure is provided by statute or these rules, the procedure for judicial review of final orders of the Land Use Board of Appeals shall be the same as for judicial review of administrative proceedings.

See ORS 197.850.

[Adopted effective January 1, 1990.]

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[1] Standards of review include but are not limited to do novo review and substantial evidence for factual issues, errors of law and abuse of discretion for legal issues, and special statutory standards of review such as those found in the Administrative Procedures Act, ORS 183.400(4) and ORS 183.480(7) and (8).

4. JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY PROCEEDINGS

A. GENERALLY

RULE 4.05 PROCEDURE TO CONFORM TO CIVIL CASES

Insofar as practicable, and except where some other procedure is provided by statute[1] or these rules, the procedure for judicial review of an order in a contested case, judicial review of a rule or judicial review of a ruling arising out of a declaratory ruling proceeding shall be the same as for appeals in civil cases.

[Adopted effective January 1, 1990.]

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[1] *See, e.g.*, ORS 656.298, relating to workers' compensation cases. *See generally* ORS 183.400 and 183.400 to 183.497.